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No. 79-797

In the Supreme Court of the United States

OCTOBER TERM, 1979

CROWN SIMPSON PULP COMPANY AND LOUISIANA-PACIFIC CORPORATION, PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 599 F. 2d 897. The decision of the Administrator of the Environmental Protection Agency (Pet. App. 24-53) is reported at 10 E.R.C. 1841.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. A petition for rehearing was denied on October 15, 1979 (Pet. App. 22). The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a final action of the Environmental Protection Agency denying a variance and vetoing a National Pollutant Discharge Elimination System permit issued by an authorized state agency is directly reviewable in the court of appeals under Section 509(b) of the Clean Water Act, 33 U.S.C. 1369(b).

STATEMENT

Pursuant to Section 301 of the Clean Water Act[1] (the Act), 33 U.S.C. (and Supp. I) 1311, the United States Environmental Protection Agency (EPA) has promulgated regulations limiting the amount of effluent that can be discharged into navigable waters. Requirements for particular discharges are implemented through National Pollutant Discharge Elimination System (NPDES) permits. Under the Act, EPA issues NPDES permits directly, except in those states where EPA has approved state administration of the NPDES program. 33 U.S.C. (and Supp. I) 1342(b) and (c). California's program has received EPA approval, and the California State Water Resources Control Board (the State Board) is therefore authorized to grant NPDES permits. However, EPA must be notified of all actions taken regarding permit applications and, if it acts within ninety days, EPA may veto the issuance of any permit. 33 U.S.C. (and Supp. I) 1342(d)(2).

Petitioners, who operate bleached kraft pulp mills located near Eureka, California, initially sought NPDES permits from the California Regional Water Resources Board, North Coast Region (the Regional Board). The Regional Board proposed to issue permits to petitioners

[1]This Act was generally known as the "Federal Water Pollution Control Act" until it was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

on August 26, 1976. On September 3, 1976, the Director of EPA's Region IX Enforcement Division objected to the proposed permits because they did not require petitioners to achieve effluent limitations based upon the best practicable control technology then available, as required by 33 U.S.C. 1311(b)(1)(A). Petitioners each sought direct review of EPA's action in the court of appeals in Nos. 76-3161 and 76-3287 (Pet. App. 2-4).

Petitioners thereupon asked the State Board for variances from EPA effluent guidelines. On March 17, 1977, the State Board granted variances, which were explicitly subject to EPA approval, and proposed to issue permits based on those variances. On May 26, 1977, the EPA General Counsel issued a Recommended Decision of the Administrator recommending denial of the variances. 42 Fed. Reg. 28167-28172 (1977). On September 15, 1977, the EPA Administrator issued a final decision denying petitioners' variance requests and disapproving the State's proposed permits (Pet. App. 24-53). The decision was based upon a review of the extensive record compiled during the state proceedings, briefs submitted by petitioners and written comments on the recommended decision (Pet. App. 24-26).

Petitioners sought review in No. 77-3322 of the Administrator's refusal to approve the state-proposed variances. They claimed jurisdiction under the direct review provisions set forth in Section 509(b)(1)(E) and (F) of the Act, 33 U.S.C. 1369(b)(1)(E) and (F).[2] The court of appeals held that it did not have jurisdiction to consider the claim. The court concluded that Subsection

[2]EPA originally contended that jurisdiction existed under Subsection (E) and later, in the joint petition for rehearing, it agreed that jurisdiction would also lie under Subsection (F).

(E), which governs review of an action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316," did not apply here, since the Administrator did not approve or promulgate anything, but instead rejected a proposed permit (Pet. App. 4, 5, 8). The court also found that Subsection (E) applied to generalized effluent limitations affecting whole categories of plants, rather than to adjudications affecting single plants (Pet. App. 9-10).

Subsection (F) provides direct review of an EPA Administrator's action "in issuing or denying any permit under section 1342 of this title." The court followed its previous decision in *State of Washington* v. *EPA* (*Scott Paper*), 573 F. 2d 583 (9th Cir. 1978), which held that Subsection (F) applied to the Administrator's own action in issuing or denying a permit, but not to his veto of a state's issuance of a permit (Pet. App. 10-14). Accordingly, the court dismissed the petitions for review without reaching the merits.

Judge Renfrew concurred (Pet. App. 15-21) on the ground that *Scott Paper* was controlling. However, he went on to urge the court to convene en banc to reconsider *Scott Paper*, which he felt to be wrongly decided. Judge Renfrew concluded that the policies of the Act were best effectuated by reading "denying [a] permit" to include objecting in writing to a permit and thus that Subsection (F) conferred jurisdiction on the court of appeals.

Petitioners and the United States filed a joint petition for rehearing and suggestion for rehearing en banc on the jurisdictional question, which was denied on October 15, 1979 (Pet. App. 22).

DISCUSSION

The petition in this case raises the question of the appropriate forum for reviewing final EPA actions in states that administer approved NPDES permit systems.[3] We believe that the decision below is erroneous on two counts, one of which creates a conflict in the courts of appeals. We note, however, that the continuing importance of the issue may be affected by the intervening passage of amendments to the Clean Water Act in 1977.

1. The decision below and the Ninth Circuit's earlier decision in *State of Washington* v. *EPA* (*Scott Paper*), 573 F. 2d 583 (9th Cir. 1978), both relied upon decisions of the Second and Fifth Circuits holding that direct court of appeals review of EPA's failure to object to a permit granted by a state agency was not available under Section 509, 33 U.S.C. 1369. *Save the Bay, Inc.* v. *EPA*, 556 F. 2d 1282 (5th Cir. 1977); *Mianus River Preservation Committee* v. *EPA*, 541 F. 2d 899 (2d Cir. 1976). As Judge Renfrew points out (Pet. App. 17-19), these decisions do not support the decision of the court of appeals. EPA's failure to object to state issuance of a permit requires no more than silent acquiescence for the 90-day statutory period. Accordingly, failure to object would not necessarily be "Administrator's action" within the meaning of Section 509(b)(1). Moreover, because no action is taken, it is likely that no administrative record amenable to review would result from a decision not to object to a state-issued permit. See *Save the Bay, Inc.* v. *EPA*, *supra*, 556 F. 2d at 1291-1292. In contrast, when the Administrator vetoes a state permit that is based

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[3]The Court is presently considering an analogous jurisdictional issue under the Clean Air Act in *Harrison* v. *PPG Industries, Inc.*, cert. granted, No. 78-1918 (Oct. 1, 1979). Because of differences in the two statutes, the decision in *Harrison* will not resolve the question presented in this case.

upon a variance, he has clearly taken an action, and an administrative record will have been prepared the same as if EPA were denying a permit directly as it does in states that do not administer their own program. Indeed, the Second Circuit stated in dictum in *Mianus* that an EPA veto clearly would be reviewable under Section 509(b)(1). 541 F. 2d at 909.

Apart from the dictum in *Mianus*, the decision of the court of appeals squarely conflicts with the Sixth Circuit's decision in *Ford Motor Co.* v. *EPA*, 567 F. 2d 661, 668 (1977), which held that an EPA veto of a state-granted NPDES permit was directly reviewable under Section 509(b)(1)(F). This holding was reaffirmed subsequent to the decision in *Scott Paper* in *Republic Steel Corp.* v. *Costle*, 581 F. 2d 1228, 1230 n.1 (6th Cir. 1978). Thus, it appears that the conflict between these two circuits will not be resolved without action by this Court. Finally, in *Shell Oil Co.* v. *Train*, 585 F. 2d 408 (1978), a different panel of the Ninth Circuit stated in dictum that an EPA veto of a state-issued variance would be "reviewable in this court under 33 U.S.C. §1369(b)(1)." 585 F. 2d at 412.

2. The decision of the court of appeals established a two-tiered system of review that must result in delays in resolving disputes under the Act, frustrating the purpose of Section 509(b)(1). See *Central Hudson Gas & Electric Corp.* v. *EPA*, 587 F. 2d 549, 557 (2d Cir. 1978). Moreover, there is no practical difference between a direct EPA denial of a permit or the veto of a state-issued permit considered here. The effect of both actions is to deny the permit within the meaning of 33 U.S.C. 1369(b)(1)(F). The bizarre result of the decision of the court of appeals is that some permit denials will be challenged in district court and others directly in the

court of appeals, depending on whether the state where the plant is located administers an approved permit system. The court of appeals does not suggest any policy reason for this distinction other than that Congress may have intended to divide the burden of "this potentially staggering new caseload between the district courts and the courts of appeals" (Pet. App. 14). Nothing in the legislative history or the Act itself suggests that Congress intended such a division of review; rather, Congress' desire was for a unified review system at a single level to prevent delay in the achievement of the Act's goals. See *E.I. du Pont de Nemours & Co.* v. *Train*, 528 F. 2d 1136, 1141-1142 (4th Cir. 1975), aff'd, 430 U.S. 112 (1977). As this Court found in a slightly different context, it is "unlikely that Congress intended such bifurcated review" under the Act. 430 U.S. at 128 n.18.

3. Section 402 of the Clean Water Act was amended in 1977, after the permit in this case was denied, to provide that:

> (d)(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

33 U.S.C. (Supp. I) 1342(d)(4). This power was granted to EPA "in order to avoid the impasse" that existed when EPA vetoed a state-issued permit and the state did

not then issue a new permit consistent with EPA guidelines. S. Rep. No. 95-370, 95th Cong., 1st Sess. 73 (1977). The Conference Report makes clear that "the Administrator is expected to use the authority given by this amendment to issue a permit after objecting to a State-issued permit." H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 97 (1977). Under the law, as amended, an EPA veto of a state permit is therefore essentially a preliminary action to issuance of a final permit under 33 U.S.C. (Supp. I) 1342(d)(4) and thus should not be reviewable until the permit issues. See 44 Fed. Reg. 32877-32878 (1979). The Conference Report explicitly states that "any litigation over the degree of effluent reduction required for a source should take place in the context of judicial review of the permit, rather than in the context of an enforcement action." H.R. Conf. Rep. No. 95-830, *supra*, at 97. Thus, the question of the proper forum for review of a veto of a state permit may not be of much future importance.

If the veto is still reviewable after the 1977 amendments, however, the Conference Report makes it clear that review is to be directly in the court of appeals. "Judicial review arising out of this provision would be in the same manner as judicial review of any EPA issued 402 permit" (*ibid.*) which is in the court of appeals under 33 U.S.C. 1369(b)(1)(F).

4. The court of appeals also held that Section 509(b)(1)(E) did not authorize direct review in the court of appeals of an EPA denial of a variance, and no court of appeals has specifically held to the contrary. The court held that an EPA denial of an individual variance was not covered by Subsection (E) because that refers only to general effluent guidelines. This theory is at odds with this Court's suggestion in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977), that a variance

granted under Section 301(c) of the Act is directly reviewable in the court of appeals under Subsection (E). See also *Weyerhaeuser Corp.* v. *Costle*, 590 F. 2d 1011, 1033 n.29 (D.C. Cir. 1978). The court distinguished these cases on the ground that an EPA objection to a state-proposed variance is to be treated differently from an EPA denial of a variance (Pet. App. 10-11 n4).[4]

First, the court suggests no justification for this distinction. More importantly, the court erred in failing to recognize that, unlike permits, variances "must be approved" by EPA—states have no authority to issue variances. See 40 C.F.R. 430.72. Thus, EPA's action was an EPA denial of a variance and must be reviewable directly in the court of appeals under Subsection (E). In light of the absence of a conflict, however, we do not urge that the Court grant plenary review at this time in respect of this question.

5. In the circumstances, we do not oppose the granting of the petition for certiorari. The Court may wish to consider, however, whether summary reversal would be appropriate.[5]

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[4]The court also relied on the fact that Section 301(c) applies only to permit applications filed after July 1, 1977, but the variance in this case is not sought under Section 301(c) but under the variances established by regulation for the 1977 limitations.

[5]We note that, if certiorari is granted, all parties will be urging reversal. If the Court deems plenary consideration appropriate, it may wish to consider the appointment of counsel to appear as amicus curiae in support of the judgment below. See *Granville-Smith* v. *Granville-Smith*, 348 U.S. 885 (1954), 349 U.S. 1, 4 (1955); cf. *Menominee Tribe* v. *United States*, 390 U.S. 916, 391 U.S. 404, 407 (1968).

Respectfully submitted.

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